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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 111

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 156–166) is reported at 354 F. 2d 594. The Board's findings of fact, conclusions of law, and order (R. 2–36) are reported at 149 NLRB 646.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1965, timely petitions for rehearing were denied on January 24, 1966, and a decree was entered on February 23, 1966 (R. 156, 168, 176). The petition for a writ of certiorari was filed on April 22, 1966, and granted on June 6, 1966 (R. 178; 384 U.S.

968). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are printed in the Appendix, *infra*, pp. 40–41.

QUESTION PRESENTED

Whether a provision in a collective bargaining agreement that the employees will not handle prefabricated materials incorporating work which they have traditionally performed violates the prohibition of the National Labor Relations Act against "hot cargo" clauses (Section 8(e)), even though the sole purpose of the challenged provision is to preserve the work opportunities of those employees.[1]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Metropolitan District Council of Philadelphia and vicinity of the United Brotherhood of Carpenters and Joiners of America is an association of local carpenter unions in the Philadelphia area (R. 16–18, 89–91). The Council bargains on behalf of these locals with the General Building Contractors Association,

[1] A similar question is presented in *Houston Insulation Contractors Ass'n* v. *National Labor Relations Board*, pending on petition for certiorari, No. 206, this Term. See also *National Labor Relations Board* v. *Houston Insulation Contractors Ass'n*, No. 413, this Term.

Inc., the trade association of construction contractors in the area, and polices the resulting agreements (R. 6, 9, 16–18, 26, n. 14; 91). For many years, collective bargaining agreements between the Council and the Association have provided (R. 10, 16, n. 46; 122–123):

> Rule 17.* * * No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which have been previously fitted. This section to exempt partition work furnished in sections.

The cutting out and fitting of millwork (including doors) is work that traditionally has been performed by the carpenters employed on the job site and the purpose of this contract provision was to preserve those tasks for them (R. 26–27, 107–111).

In May and June 1963, the Council, invoking this provision, directed certain employees not to install "pre-cut" doors for their employers, four contractors working in the Philadelphia area under the collective bargaining agreement (R. 10–15, 56, 61–67, 69–71,

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*The first sentence of this provision (omitted in the quotation) provides that no employee shall work on sash, doors, or other millwork that does not bear the label of the Carpenters' Union. The Board held that this restriction violates Section 8(e) of the Act, and the Union did not challenge that finding in the court of appeals. The "union label" provision has not been enforced for a number of years (R. 23, 158, n. 1).

79–80, 85–86, 94–98, 116).[5] Three of the contractors were required by their contracts with the owners of the construction projects involved to install pre-cut, prefinished doors, and the doors which the Union refused to hang for these contractors all bore a union label (R. 11–15, 53–55, 60–61, 67–69, 78–80).[6] The fourth contractor (Frouge) had also ordered pre-cut doors, though not required to do so (R. 15, 92–93, 97). When the Union refused to install these doors, Frouge substituted "blank" doors (see n. 3, *supra*), which the Council's carpenters installed, although the substitutes, like the earlier doors, bore no union label (R. 15–16, 94–98).

B. THE BOARD'S CONCLUSIONS AND ORDER

In charges filed with the Board, the Association alleged that the contract provision barring pre-cut doors violated Section 8(e) of the Act, and that work stoppages to enforce that provision constituted an unfair labor practice under Section 8(b)(4)(A).[7] The Association also alleged that the Union's efforts to make Frouge abide by the agreement and its re-

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[5] A "pre-cut," "pre-fit," or "pre-machined" door is mortised for the knob, routed for the hinges, and bevelled to fit between the jambs prior to its arrival at the job site. A door that has not been prepared in this fashion is called a "blind" or "blank" door (R. 9). It appears that in this case pre-cut doors were chosen by the project owners for structural and aesthetic reasons (R. 54–55, 58–59).

[6] Later, one of the contractors agreed to pay its employees the wages that they would have received had the disputed work not been performed at the factory, and the Union then agreed to and did install the pre-cut doors for him (R. 14–15, 80–82).

[7] Section 8(b)(4)(A) makes it an unfair labor practice to force or require an employer to enter into a contract that violates Section 8(e).

fusal to install pre-cut doors for the three employers contractually obligated to use them violated Section 8(b)(4)(B) as unlawful secondary boycotts.

The Board dismissed the allegations under Sections 8(e) and 8(b)(4)(A), concluding that the challenged contract provision was outside the scope of Section 8(e) because its object was "primary" rather than "secondary"—to preserve work which the employees covered by the agreement have traditionally performed rather than to exert pressure on other employers with whom the Union had a dispute (R. 26–28). The Board also dismissed the allegation relating to Frouge, on the ground that, since Frouge had control over the kind of doors it used, the Union's efforts to make it abide by the agreement were primary—to stop Frouge from violating the lawful contract prohibition against the use of prefabricated materials.

However, the Board held that the Union's refusal to install pre-cut doors for the three employers contractually obligated to use them did violate Section 8(b)(4)(B). The Board reasoned that, since these contractors (in contrast to Frouge) did not have control over the work that the Union sought to protect for its employees, the Union's objective was secondary—to compel the project owners to stop specifying pre-cut doors in their contracts with the contractors (R. 28–30, n. 21). The Board issued a remedial order, limited to the violations of Section 8(b)(4)(B) that it had found (R. 34–36).

C. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's rulings with respect to the application of Section 8(b)(4)(B)

(R. 161–162, 166). But the court ruled that the challenged contract provision violated Section 8(e) and that the work stoppages called to enforce the provision therefore violated Section 8(b)(4)(A) (R. 166). In the court's view, the challenged contract provision was designed to effect a product boycott like the one condemned in *Allen Bradley Co.* v. *Local No. 3, Electrical Workers*, 325 U.S. 797, and Congress intended to ban such boycotts in enacting these statutory provisions (R. 162–163); the court derived additional support for its conclusion from the limited scope of the construction industry proviso to Section 8(e) (R. 165–166).[6] The court directed the Board to enter an order in accordance with its opinion (R. 166).[7]

SUMMARY OF ARGUMENT

I

Section 8(e) of the Act, added in 1959, was intended to close a loophole which existed in the secondary boycott provisions of the 1947 Act. Section

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[6] That proviso is discussed *infra*, pp. 32–35.

[7] A companion case, *National Woodwork Mfrs. Ass'n* v. *National Labor Relations Board*, No. 110, this Term, challenges the propriety of the Board's finding, affirmed by the court below, that the Union's refusal to handle doors for Frouge, a contractor who used pre-cut doors although not contractually obligated to do so, did not violate Section 8(b)(4)(B) of the Act. We treat this question in our separate brief in No. 110. The propriety of the Board's finding, sustained by the court below, that the refusal to handle doors for the other three contractors, who were contractually obliged to use pre-cut doors, did violate Section 8(b)(4)(B) is not in issue in either No. 110 or this case, no petition having been filed with respect to that question.

8(b)(4)(A) of the latter Act (now Section 8(b)(4)(B)) made it an unfair labor practice for a union to induce the employees of one employer to strike in order to force him to cease doing business with another employer, with whom the union had a primary dispute or whose products it disfavored because they were "non-union." In *Local 1976, Carpenters' Union v. National Labor Relations Board* (*Sand Door*), 357 U.S. 93, this Court held that it was no defense to such a strike that the first employer had agreed, in a contract with the union, not to handle non-union materials. However, the Court emphasized that the mere execution of such a contract provision (known as a "hot cargo" clause), or its voluntary observance by the employer, was not unlawful under Section 8(b)(4)(A). Section 8(e) was designed to plug this gap in the legislation by making the "hot cargo" clause itself unlawful.

A contract provision which seeks to preserve work for the employees in the bargaining unit covered by the agreement is significantly different from a "hot cargo" or similar clause, which is in effect a means of accomplishing a secondary boycott. In the case of such latter clauses the union has no dispute with the contracting employer, but uses the agreement with him as a device for exerting pressure on some other employer, with whom it does have a dispute or otherwise disfavors. The object of a work-preservation agreement, on the other hand, is not to put pressure on some other employer, but to protect the terms and conditions of employment of the contracting employer's own employees.

Congress, in enacting Section 8(e), did not intend to reach such primary agreements, despite the breadth of that provision's literal language. The legislative history clearly shows that the congressional purpose in enacting Section 8(e) was to outlaw "hot cargo" clauses and similar kinds of secondary agreements, but not to prohibit contractual restrictions, such as subcontracting clauses, which are primary in nature. Significantly, all of the courts of appeals which have considered Section 8(e), with the exception of the Seventh Circuit in this case, have so viewed that section and have refused to read it broadly as prohibiting primary as well as secondary agreements.

Sound policy considerations support the conclusions that Section 8(e) prohibits only secondary agreements, and that work preservation agreements, such as the one involved here, are primary in nature and are thus outside the intended scope of the section. For instance, in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, the Court read the Act as requiring employees to bargain with unions about subcontracting of work previously performed by members of the bargaining unit. "Refusal to handle" clauses directed toward work preservation are essentially restrictions on subcontracting. Congress can hardly be regarded as having outlawed under one section of the Act a contract provision which employers are required to bargain about under another section.

Section 8(e) should be read *in pari materia* with its companion provision, Section 8(b)(4)(B), since these provisions contain strikingly similar language

and complement each other by proscribing secondary agreements and secondary action. Furthermore, outlawing of work preservation agreements would effect such a fundamental change in collective bargaining practices that Congress should not be deemed, absent compelling evidence, to have intended that result. Finally, commentators on Section 8(e) have concluded that Congress intended to reach only secondary agreements, and that primary agreements, such as the work preservation clause here at issue, are outside the scope of that section.

Inclusion of the construction industry proviso in Section 8(e) is consistent with a narrow reading of that section. Furthermore, whether the pre-cut door provision satisfies the terms of the proviso is irrelevant. That proviso was intended to privilege certain secondary agreements which would otherwise be banned by Section 8(e), *e.g.*, an agreement that jobsite work would be performed by union employers. Since the pre-cut door provision is a primary, work-preservation agreement, it is not within Section 8(e) to begin with; hence, there is no occasion to inquire whether it is "saved" by the proviso thereto.

II

The prohibition on the use of pre-cut doors in the Council-Association agreement has as its object the preservation for jobsite carpenters of cutting out and fitting work which they have customarily and regularly performed for 80 years. Moreover, the Union's conduct confirms that the clause was not concerned with the labor conditions under which the doors were manu-

factured, but solely with preserving, for the employees covered by the contract, work which they had traditionally done. Accordingly, the Board properly found that the pre-cut door provision was a work preservation clause, and thus outside the reach of Section 8(e).

The validity of this conclusion is not impaired by the circumstance that the pre-cut door provision operates against a product which was manufactured off the job site. The union's object determines whether an agreement is primary or secondary; it is primary if the object is to safeguard work opportunities for the bargaining unit covered by the contract, while it is secondary if the object is to exert pressure elsewhere. It is irrelevant to this determination whether the work sought to be protected was already being performed on the job site, or was incorporated in a product and thus never got to that site.

ARGUMENT

I. SECTION 8(e) REACHES ONLY AGREEMENTS WITH A "SECONDARY" OBJECTIVE, AND NOT THOSE WITH A "PRIMARY," WORK PRESERVATION OBJECTIVE

Section 8(e) of the National Labor Relations Act, as amended in 1959, makes it an unfair labor practice for a labor organization and an employer:

> to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing

such an agreement shall be to such extent unenforcible and void * * * *.

Read literally, this language covers the contract provision involved in this case, for the agreement by which the building contractors agreed in effect not to use pre-cut and pre-fitted doors was one to "refrain from handling or using * * * the products of" other employers, *i.e.*, those who manufactured such doors.

This Court, however, has never been reluctant to give a narrow construction to broad language used by Congress where it is evident, from the circumstances surrounding the enactment of the legislation, that the congressional purpose was a limited one.[9]

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[8] There are two provisos—one for the construction industry and one for the apparel and clothing industry (set forth, *infra*, p. 41).

A corollary provision, Section 8(b)(4)(A), also added in 1959, makes it an unfair labor practice for a labor organization to engage in strike pressure in order to force or require an employer "to enter into any agreement which is prohibited by Section 8(e)." This provision does not come into play until it is first determined that the agreement sought violates Section 8(e).

[9] *E.g.*, *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 285; *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 288–289; *Rathbun* v. *United States*, 355 U.S. 107, rehearing denied, 355 U.S. 925. In *United States* v. *Witkovich*, 353 U.S. 194, 199, the Court, in rejecting the "tyranny of literalness," stated: "A restrictive meaning for what appear to be plain words may be indicated * * * by the persuasive gloss of legislative history * * *." See also *Cole* v. *Young*, 351 U.S. 536, 548. In *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479, the Court stated that "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination."' *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543–544." See also *Markham* v. *Cabell*, 326 U.S. 404, 409.

The background and context of Section 8(e) demonstrate that the broad language of that section was intended only to prohibit agreements designed to put pressure upon employers with whom the union had no dispute, in order to force them to cease dealing with employers with whom the union did have a dispute (so-called "secondary" agreements). But the section was not intended to prohibit agreements which, although they may have a similar incidental effect upon relationships between employers, were designed to regulate the working conditions of the employees covered by the contract (so-called "primary" agreements). Accordingly, despite its broad language, Section 8(e) cannot properly be read as covering *all* agreements by which the employer agrees not to deal with or handle the products of another employer—it covers only those agreements whose principal objective is secondary, not primary.

The language of Section 8(e) tracks closely the language of Section 8(b)(4)(B),[10] and that provision (Section 8(b)(4)(A) of the 1947 Act), despite its literal breadth, has been interpreted as applying, not to primary, but only to secondary, activity, *i.e.*, conduct motivated not by any concern over the terms and conditions of employment of the workers immediately involved, but rather by a desire to exert pres-

[10] Section 8(b)(4)(B) makes it an unfair labor practice for a labor organization to induce employees to strike, or to threaten, coerce, or restrain any person, for an object of—

> forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *.

sure on some other employer." There is no reason to think that a broader prohibition was intended by Congress' choice of comparable language in Section 8(e).

Indeed, in *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 672, Mr. Justice Frankfurter stated for the Court that Section 8(b)(4)(A) of the 1947 Act "could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity." Relying on the legislative history of the provision, the Court concluded that, despite its broad language, its "impact * * * was directed toward what is known as the secondary boycott" affecting a neutral employer. Similarly, Section 8(e) cannot be literally construed, since it would then ban primary activity—that directed toward work preservation for employees of the bargaining unit and not some secondary objective.

A. SECTION 8(e) WAS INTENDED TO CLOSE A LOOPHOLE IN THE SECONDARY BOYCOTT PROVISIONS OF THE ACT, AND WAS AIMED PRIMARILY AT SO-CALLED "HOT-CARGO" CLAUSES

The legislative history of Section 8(e) persuasively shows that Congress, in enacting that provision, in-

[11] See *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667; *United Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492. Although, in 1959, Congress added a proviso to Section 8(b)(4)(B), which reads that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing," this was merely intended to make explicit what had otherwise been implicit in the predecessor Section 8(b)(4)(A). *Local 761, Electrical Workers, supra*, at 681.

tended to close a loophole which existed in the old secondary boycott provisions, and hence was concerned only with a particular, limited evil—the "hot cargo" clause. Section 8(e) should be construed no more broadly than as a prohibition on agreements having secondary objectives, of which the "hot cargo" clause is the archetype and the specific kind of provision principally in the mind of Congress when it enacted that section.

Some background provides a framework for considering the legislative history of Section 8(e). Section 8(b)(4)(A) of the 1947 Act made it an unfair labor practice for a union to induce the employees of one employer to strike in order to force him to cease doing business with another employer with whom the union had a primary dispute or whose products it disfavored because they were "non-union." In *Local 1976, Carpenters' Union* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93, this Court held that it was no defense to such a strike that the first employer had agreed, in a contract with the union, not to handle non-union materials. However, the Court emphasized that the mere execution of such a contract provision, known as a "hot cargo" clause, was not unlawful under Section 8(b)(4)(A), nor was its voluntary observance by the employer. *Id.*, at 108. Congress regarded this as a substantial loophole in the secondary boycott provisions of the Act and, in 1959, set out to close it by making the "hot cargo" clause itself unlawful.

The Kennedy-Ervin Bill, S. 1555, 86th Cong., 1st Sess., as reported by the Senate Committee on Educa-

tion and Labor, did not outlaw "hot cargo" agreements. Senators Goldwater and Dirksen objected to this omission, labeling "hot cargo clauses" as "major loopholes in the present ban on secondary boycotts." S. Rep. No. 187, 86th Cong., 1st Sess. 79, I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) 475 (Minority Views). They explained (*ibid.*, emphasis supplied):

> (2) *Hot-cargo clauses.*—It has become common to find clauses in union contracts whereby the employer agrees not to handle what the union chooses to call "hot goods," "unfair materials," and "blacklisted products." Such clauses have become standard in contracts entered into by the Teamsters Union. Here, employer A, who has a dispute with a union or whose employees are being solicited for union membership, is in real trouble. He may have customers waiting for his product or he may have suppliers eager to send him raw material, but both his delivery of products and supply of raw material cannot move from or to his place of business *because the carriers* in either instance *have "hot cargo" clauses in their contracts* with the Teamsters Union. His alternative is the same as in Loophole No. 1—go out of business or yield to the union's demand, which often is a demand for a compulsory membership contract with a union which his employees do not want.[12]

[12] A definition of terms introduced in the Congressional Record by Senator Goldwater described a "hot cargo" clause as "a provision in a collective bargaining contract which seeks to permit employees to refuse to perform work on materials or

On the floor, the Senate adopted an amendment to S. 1555, offered by Senator Gore, providing that:

> (e) It shall be an unfair labor practice for any labor organization and any employer who is a common carrier subject to Part II of the Interstate Commerce Act to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, or transporting any of the products of any other employer or to cease doing business with same.[12]

Senator Kennedy stated that "the effect of the amendment would be to outlaw the so-called *hot cargo agreement*, which has been one of the means by which the Teamsters Union has expanded its power," and added that if enacted "the Teamsters [thereafter] would not be able to persuade other employers, as part of the general agreement with them, *to refuse to handle goods from another employer who might be engaged in an economic dispute with a union.*" Senator Gore

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equipment received from or being sent to another employer with whom the union has a primary dispute." 105 Cong. Rec. 17674, II Leg. Hist. 1386. Similarly, Senator McClellan, who had introduced a bill to outlaw the "hot cargo" agreement, defined it as one where an employer "agrees in advance that he will not require his employees to handle goods or provide other services for the benefit of an employer who is involved in a labor dispute." 105 Cong. Rec. 3951–3952, II Leg. Hist. 1007. Senator McClellan's bill, S. 1385, 86th Cong., 1st Sess., was entitled "to prohibit the inclusion of hot cargo provisions in collective bargaining contracts," but nevertheless contained broad language virtually identical to that in Section 8(e) as enacted.

[12] Sec. 707(a) of S. 1555 as passed by the Senate, I Leg. Hist. 582. See also 105 Cong. Rec. 6556–6557 II Leg. Hist. 1161–1163.

replied, "The Senator is correct." 105 Cong. Rec. 6556, II Leg. Hist. 1162, emphasis supplied.

The prohibitory language of the Gore amendment appeared substantially unchanged in the Elliott Bill, which was reported out by the House Committee on Education and Labor. See Section 705(a)(2) of H.R. 8342, 86th Cong., 1st Sess., I Leg. Hist. 755.[14] The Landrum-Griffin substitute, passed by the House and acceded to by the Senate, eliminated the phrase "who is a common carrier subject to Part II of the Interstate Commerce Act," and added the italicized language shown below:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express, or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, *selling,* transporting *or otherwise dealing in* any of the products of any other employer, or to cease doing business with *any other person, and any collective bargaining contract * * * containing such an agreement shall be to such extent unenforcible and void.*[15]

The debates show that these revisions were merely designed to extend the prohibition against "hot cargo" agreements in the earlier bills to employers *other* than

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[14] The report accompanying the Elliott Bill indicated that Sec. 705(a)(2), like the comparable Senate provision, was aimed at "hot cargo" clauses. H. Rep. No. 741, 86th Cong., 1st Sess. 20–21, I Leg. Hist. 778–779; *id.*, at 838 (Supplementary Views).

[15] Sec. 705(b)(1) of H.R. 8400, 86th Cong., 1st Sess., I Leg. Hist. 683.

common carriers and to make the prohibited agreements unenforceable and void; there was no intention to extend the provision to other kinds of agreements that, unlike "hot cargo" clauses, were not secondary in nature.[16] Thus, explaining the shortcomings of the Elliott Bill, Representative Griffin stated (105 Cong. Rec. 14343, II Leg. Hist. 1518, emphasis supplied):

> A secondary boycott is a situation where the union, in a dispute with one employer, puts pressure upon another employer or his employees, in order to force the second employer or his employees, to stop doing business with the first employer, and "bend his knee to the

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[16] The use of rather broad language in Section 8(e) is explicable mainly on the ground that Congress wanted to insure that the scope of that provision would be found sufficiently extensive, upon judicial construction, to interdict all forms of those secondary agreements, principally "hot cargo" clauses, which it sought to prohibit. Moreover, the provision was regarded as a complement to Section 8(b)(4)(B), which used similarly broad language. Little consideration was given to the possibility that Section 8(e)'s language might be construed, because of its breadth, to include agreements which were primary in motive. See *infra*, pp. 23–24. However, in a list of differences between the Senate-passed and House-passed bills prepared by Senator Goldwater, it is commented: "A literal interpretation of the language in the hot cargo provisions of the House bill might invalidate agreements respecting the rights of employees to refuse to handle 'farmed-out struck work,' or to use unsafe equipment. If this provision should be accepted by the conferees, it might be desirable to make some clear legislative history that there is no intention in section 705(b) to affect the rights of employees with respect to farmed-out struck work [made clear by the Conference Report, I Leg. Hist. 942], unsafe equipment, and matters of that nature." 105 Cong. Rec. 16490, II Leg. Hist. 1860.

union's will." Thus it is called secondary activity.

> The committee bill [the Elliott Bill] would deal with this problem *only in the very narrow way of proscribing the formal execution of "hot cargo" contracts with those employers subject to the Interstate Commerce Act, part II.* There of course are thousands of employers not covered by *such provisions,* with whom the Teamsters, and other unions, could and surely would execute and effectuate *such agreements.* By not prohibiting the others, by not naming them, the committee bill would indirectly sanction, if indeed not approve, their execution. I submit if *such contracts* are bad in one segment of our economy, they are undesirable in all segments.[17]

When the Landrum-Griffin Section 8(e) provision emerged from the Senate-House Conference Commit-

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[17] In a memorandum placed in the Congressional Record, Rep. Griffin reiterated the same point (105 Cong. Rec. 14347–14348, II Leg. Hist. 1523, emphasis supplied):

> Subsection (b) of section 705 also concerns *the hot cargo problem.* Both the Senate bill in section 707(a) and the committee bill in section 705(a) display some concern with this tactic by making it an unfair labor practice for common carriers and unions to enter into contracts whereby the carrier agrees to refrain from transporting certain products or to provide services to some employer. However, there is no valid reason why this prohibition on *hot cargo contracts* should apply only to the carriers subject to the Interstate Commerce Act. Subsection (b) of section 705 not only makes it an unfair labor practice to enter into a *"hot cargo" agreement,* but also make it clear that such contracts are void and unenforcible.

See also 105 Cong. Rec. 15532, II Leg. Hist. 1568 (Rep. Griffin).

tee, exemptions were added for the construction and the clothing and apparel industries (discussed *infra*, pp. 32–35), but it was still understood that the provision, though applicable to all other industries, was limited to "hot cargo" agreements. Thus, the discussion of the provision in the House Conference Report is headed "Section 704(b)—Hot-Cargo Agreements." H. Rep. No. 1147, 86th Cong., 1st Sess. 39, I Leg. Hist. 943. Senator Kennedy, in explaining the Conference agreement, stated (105 Cong. Rec. 17899, II Leg. Hist. 1432, emphasis supplied):

> Fourth. *Hot cargo:* The Landrum-Griffin bill extended the *"hot cargo"* provisions to the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries.

And, Senator Goldwater added (105 Cong. Rec. 17904, II Leg. Hist. 1437, emphasis supplied):

> Only *hot cargo agreements* between a union and a common carrier were banned by the Senate bill; the House bill extended *this ban* to all unions and employers by making them illegal, unenforcible and void. Because of the persuasive arguments made [by] our colleagues, the Senators from New York * * * and the Senator from Pennsylvania * * * the

Republican conferees were persuaded to support the addition of a provision exempting the garment industry from the prohibitions on boycotts and hot cargo agreements.[18]

In sum, the legislative history of Section 8(e) shows that Congress was concerned only with a limited evil, the "hot cargo" agreement, which embroiled the contracting employer in a dispute not his own, and thus was nothing more than a "secondary boycott in futuro" (105 Cong. Rec. A8359, II Leg. Hist. 1829). In the light of this history, the broad language of Section 8(e) cannot be read literally as prohibiting *all* agreements by which an employer "agrees to cease or refrain from handling, using * * * or otherwise dealing in any of the products of any other employer." On the contrary, it must be read as cover-

[18] Throughout the debates, the legislators, in defining or illustrating the agreements to be outlawed by Section 8(e), almost uniformly referred to them as "hot cargo" contracts or contracts binding an employer to assist a union by ceasing to do business with *another employer with whom the union had a dispute.* See 105 Cong. Rec. 3951–3952, II Leg. Hist. 1007 (Senator McClellan); 105 Cong. Rec. 6428, 10104–10105, 17674, II Leg. Hist. 1079, 1290, 1386 (Senator Goldwater); 105 Cong. Rec. 6556, II Leg. Hist. 1162 (Senator Kennedy); 105 Cong. Rec. 6671, II Leg. Hist. 1197 (Senator Curtis); 105 Cong. Rec. 14342, 14346-14347, II Leg. Hist. 1518, 1523 (Rep. Landrum); 105 Cong. Rec. 15519, II Leg. Hist. 1555–1556 (Rep. Landrum); 105 Cong. Rec. 15581–15582, II Leg. Hist. 1568 (Rep. Griffin); 105 Cong Rec. 15551–15552, II Leg. Hist. 1588 (Memorandum of Rep. Elliott placed in record by Rep. Bolling); 105 Cong. Rec. 16101, II Leg. Hist. 1703 (Rep. Roosevelt); 105 Cong. Rec. 15674, II Leg. Hist. 1616 (Rep. Bosch); 105 Cong Rec. 15677, II Leg. Hist. 1620 (Rep. Cramer).

See also 105 Cong. Rec. A8359, II Leg. Hist. 1829 (article inserted by Senator Goldwater); 105 Cong. Rec. 19772, II Leg. Hist. 1858 (analysis by Senator Goldwater).

ing only such of those agreements as are secondary in nature, *i.e.*, those designed to bring pressure upon a neutral employer to force him to aid the union's campaign against the employer with whom the union has a labor dispute. It cannot fairly be read as extending to agreements which, in contrast to "hot cargo" and similar secondary agreements, are designed to exert primary pressure, *i.e.*, pressure directed primarily toward the terms and conditions of employment, such as the preservation of work opportunities for the employees whom the union represents.

B. A "WORK PRESERVATION" AGREEMENT IS NOT OF THE KIND THAT CONGRESS INTENDED TO MAKE UNLAWFUL UNDER SECTION 8(e)

While an incidental effect of an agreement which seeks to preserve work for the employees in the bargaining unit covered by the contract, *e.g.*, a clause barring the contracting employer from subcontracting unit work, may be to curtail business relations between two employers, such an agreement is significantly different from a "hot cargo" agreement. A "hot cargo" agreement is a means of effecting a secondary boycott. The contracting employer is secondary because the union has no dispute with him; his agreement to cease doing business with, or handling the products of, certain other employers is merely a means of exerting pressure on the latter, with whom the union has a primary dispute or otherwise disfavors. The object of a work preservation agreement, on the other hand, is not to put pressure

on some other employer, but to protect the terms and conditions of employment of the contracting employer's own employees; the contracting employer is thus primary and not secondary.[19]

As shown (*supra*, pp. 13–22, Section 8(e) was designed to fill a gap in the secondary boycott provisions of the Act, and the agreements sought to be interdicted under that section were repeatedly characterized as "hot cargo" clauses or agreements binding an employer to cease doing business with another with whom the union had a dispute. While there are a few suggestions in the legislative history that Section 8(e) might be broadly construed to interdict primary as well as secondary agreements,[20] the over-

[19] See the Statement prepared by Senator Kennedy and Rep. Thompson on "Secondary Boycotts and Hot Cargo Contracts," 105 Cong. Rec. 16588–16590, II Leg. Hist. 1706–1708. See also, Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 273 (1959); Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§8(b)(4) and 8(e)*, 113 U.Pa. L.Rev. 1000, 1009–1015 (1965).

[20] For instance, Senator Morse contended that Section 8(e) would render unlawful subcontracting clauses, and the same fear was expressed by Senator Kennedy and Representative Thompson. 105 Cong. Rec. 17884, 16590, II Leg. Hist. 1428–1429, 1708. However, Senator Morse was an opponent of the Landrum-Griffin Bill, and Senator Kennedy and Representative Thompson, at the time they made their statement, were opposed to its enlargement of the Senate's Section 8(e) provision. See *National Labor Relations Board* v. *Fruit & Vegetable Packers*, 377 U.S. 58, 66–67. Significantly, after the Bill emerged from the Conference, with the proviso (in Section 8(b)(4)(B)) specifically protecting primary activity (see n. 11, *supra*), neither Senator Kennedy nor Representative Thompson continued to view it as interdicting subcontracting agreements. See Senator Kennedy's statement, *supra*, p. 20. See also 105 Cong. Rec. 18135, II Leg. Hist. 1722 (Rep. Udall).

Representative Rhodes suggested that Section 8(e) would reach

whelming weight of the legislative history indicates that Congress did not intend such a result."[21] Most of these suggestions came from opponents of the legislation and were presented along with a number of other statements about the supposedly undesirable effects of the legislation. That the supporters of Section 8(e) did not see fit to respond to these suggestions indicates that Congress collectively viewed these suggestions as unfounded and the legislative history sufficiently clear that the provision reached only secondary agreements."[22]

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the contracts of "various building and printing trade unions" which excuse employees "from handling certain prefabricated products, products which do not bear the label of a particular union, or products manufactured by a company dealing with some other union" (105 Cong. Rec. 15545, II Leg. Hist. 1581). It seems clear from the context of his remarks that he was referring to agreements with a secondary objective. Similarly, the comments of Senator McNamara and Representatives Thompson and Kearns, respecting prefabrication clauses in the plumbing industry, occur in a context where at least one of the clauses discussed had a secondary objective—permitting subcontracting only to a fabricator "who has an agreement with a local union of the pipefitters." See 105 Cong. Rec. 19785, 19809, 2004–2005; II Leg. Hist. 1815, 1816, 1861. See Comment, 45 Cornell L.Q. 724, 753 (1960).

[21] See references listed in n. 18, *supra*.

[22] In addition, most of the suggestions that Section 8(e)'s language might be construed broadly as a ban on all contractual restrictions on subcontracting (see n. 20, *supra*) were made quite late in the session. Legislators supporting the Bill may understandably have been reluctant to seek an amendment of the language or state definitively that the section should be read narrowly. Any such action might have upset the consensus on the Bill reached with considerable difficulty and undermined the delicate balancing upon which the overall legislation was grounded.

C. ALL OF THE COURTS OF APPEALS WHICH HAVE PASSED ON SECTION 8(e), EXCEPT THE COURT BELOW, HAVE CONSTRUED IT AS NOT PROHIBITING PRIMARY AGREEMENTS

Significantly, the courts of appeals other than the court below which have passed on the question have uniformly declined to read Section 8(e) literally. Instead, they have examined both the language and the surrounding circumstances of each agreement challenged under Section 8(e) to determine whether the agreement is secondary or primary—*i.e.*, whether it "'extend[s] beyond the [contracting] employer and [is] aimed really at the union's difference with another employer,'" or whether it "'will directly benefit employees covered thereby' and 'seeks to protect the wages and job opportunities of the employees covered by the contract.'" *Orange Belt District Council of Painters* v. *National Labor Relations Board*, 328 F. 2d 534, 538 (C.A. D.C.) (citations omitted). If the clauses are secondary, they have been held to be within Section 8(e), but, if they "'are germane to the economic integrity of the principal work unit' and 'seek to protect and preserve the work and standards [the union] has bargained for'" (*ibid.*), they have been held to fall outside of that section. *Orange Belt, supra*, at 537–538; *Meat and Highway Drivers, Local No. 710* v. *National Labor Relations Board*, 335 F. 2d 709, 713–717 (C.A. D.C.); *Truck Drivers Local 413* v. *National Labor Relations Board*, 334 F. 2d 539, 548 (C.A. D.C.), certiorari denied, 379 U.S. 916; *Lewis* v. *National Labor Relations Board*, 350 F. 2d 801, 802 (C.A. D.C.); *National Labor Relations Board* v. *Joint Council of Teamsters*, 338 F. 2d 23, 28 (C.A. 9); *Todd Shipyards Corp.* v. *Marine and Shipbuilding Workers Union*, 344 F. 2d 107 (C.A. 2); *Houston Insulation Contractors*

Ass'n v. *National Labor Relations Board*, 357 F. 2d 182 (C.A. 5), petition for certiorari filed, No. 206, this Term. See also *District 9, Machinists* v. *National Labor Relations Board*, 315 F. 2d 33, 36 (C.A. D.C.); *Retail Clerks Union Local 770* v. *National Labor Relations Board*, 296 F. 2d 368, 373–374 (C.A. D.C.).

Thus, all of the courts which have considered Section 8(e), except for the Seventh Circuit in this case, have both accepted the primary/secondary agreement analysis presented here and, at least impliedly, regarded work preservation agreements as primary in nature.[23] In contrast to the attenuated discussion of the question in the opinion of the court below,[24] some

[23] Similarly, the Board has itself consistently refused to read Section 8(e) literally, and has instead engaged in a primary/secondary analysis, such as that contended for here, in determining what agreements are included within the scope of that section. See, *e.g.*, *Milk Drivers and Dairy Employees Union, Local 546*, 133 NLRB 1314, 1316–1317; *Ohio Valley Carpenters District Council*, 136 NLRB 977, 985–986. That the Board has had some difficulty in drawing a precise line between primary and secondary agreements (*e.g.*, *Meat and Highway Drivers, Local No. 710*, 143 NLRB 1221) does not detract from the fact that, in applying Section 8(e) in the first instance, it has construed that section as extending only to agreements which are secondary in nature. And the Board has regarded work preservation agreements as lawful and not proscribed by Section 8(e), so long as no secondary objective is involved. See cases cited in Lesnick, n. 19, *supra*, at 1022, n. 92.

[24] *Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U.S. 797, does not support the result reached by the court below. There, as in the other cases relied on by the Seventh Circuit (*Joliet Contractors Ass'n* v. *National Labor Relations Board*, 202 F. 2d 606 (C.A. 7), certiorari denied, 346 U.S. 824; *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 (C.A. 6)), the union's purpose was not to protect the work opportunities

of the opinions in the cases referred to above contain elaborate and well-reasoned analyses of the intended thrust of Section 8(e).

D. SOUND POLICY CONSIDERATIONS SUPPORT THE CONCLUSIONS HERE REACHED

Sound underlying policy considerations support the conclusions that Section 8(e) was not intended to reach primary agreements. A literal reading of Section 8(e) would produce, in certain respects, rather anomalous results. For instance, it might result in an employer being required to bargain about an unlawful contract provision.

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of the employees immediately involved, but to further some other objective elsewhere. This was also the situation in the illustrations cited by Senators Taft and Ellender in connection with Section 8(b)(4)(A) of the 1947 Act. 93 Cong. Rec. 3838, 4132, 4198–4199; 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 1012, 1056, 1107–1108 (R. 126–130).

In *Allen Bradley*, the union induced members employed by electrical contractors in New York City to refrain from installing equipment manufactured outside the city, not in order to protect the work of the contractors' employees, but, rather, in order to create a sheltered market for the New York City manufacturers, whose employees were also represented by the union. See Lesnick, n. 19, *supra*, at 1017–1018. Since the prohibition upon the use of materials manufactured outside New York was therefore unrelated to the work of the employees of the employers against whom it was enforced, it was "secondary" as to those employers. That is not the case here. Similarly, in *Local 11*, the union refused to handle the prehung doors because they did not have the Carpenters' label and were thus "nonunion." And in *Joliet Contractors*, the court found that the union's "target was the use of preglazed sash, and any and all who handled, used or sold such sash were the intended and in many cases the actual victims of the Union's course." 202 F. 2d at 610.

In 1959, when Congress added Section 8(e) to the Act, restrictions against subcontracting or other farming out of unit work were frequently to be found in collective bargaining agreements. As this Court pointed out in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 211–212: "Provisions relating to contracting out exist in numerous collective bargaining agreements, and '[c]ontracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators'" (quoting from *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584). See also *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283. And, as the Court held in *Fibreboard*, Section 8(a)(5) of the Act imposes upon an employer the duty to bargain with the representative of his employees about subcontracting, at least in certain circumstances.[25] *Fibreboard* involved an alleged refusal to bargain with respect to the "contracting out of plant maintenance work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform." 379 U.S. at 210. Thus, the duty to bargain found by the Court

[25] In addition, provisions assigning work functions to certain employees or to a particular bargaining unit are commonly found in collective bargaining agreements, and are considered by the Board in resolving jurisdictional disputes under Section 10(k) of the Act. See *National Labor Relations Board* v. *Radio and Television Broadcast Engineers*, 364 U.S. 573, 577, n. 12; *National Ass'n of Broadcast Engineers*, 105 NLRB 355; *Local No. 48, Sheet Metal Workers*, 119 NLRB 287.

in that case could lead to an agreement against subcontracting much like the work preservation agreement at issue in this case. It is hardly likely that Congress, in Section 8(e), intended to outlaw a contract provision which Section 8(a)(5) would have required the employer to bargain about.

As mentioned previously (*supra*, pp. 12–13), Section 8(b)(4)(B) is a companion provision to Section 8(e) and contains strikingly similar language. These sections were plainly intended to complement each other, with Section 8(b)(4)(B) prohibiting certain kinds of secondary *action* or inducement to action and Section 8(e) banning certain kinds of secondary *agreements*. Section 8(b)(4)(B) now contains a proviso specifically excepting primary activity, although the Court read that proviso, in *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, as simply making explicit what had already been implicit in the former Section 8(b)(4)(A)—that primary activity was not proscribed by the Act (see n. 11, *supra*). It would seem rather strange to attribute to Congress an intention to prohibit primary agreements but not primary action, absent convincing evidence in this regard.[26]

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[26] Congress presumably thought it unnecessary to include a parallel proviso in Section 8(e), since it felt that that section would undoubtedly be construed *in pari materia* with 8(b)(4)(B) and since its purpose in enacting 8(e) was principally the interdiction of a specific kind of secondary agreement—the "hot cargo" clause. See *Mastro Plastics Corp.* v. *National Labor Relations Board*, *supra*, at 286, where the Court cautioned against accepting a statutory construction which "would produce incongruous results." Furthermore, the proviso was added

Moreover, since work preservation agreements are widespread and commonplace in many industries, Congress, in enacting Section 8(e), should be regarded as legislating with this factual background in mind. And, as the interdiction of work preservation agreements would have effected such a fundamental and sweeping change in accepted collective bargaining practices and labor-management relations generally, it is unreasonable to assume, without clear evidence, that Congress meant to go that far.

Finally, commentators on the Landrum-Griffin amendments to the Act have supported the narrow reading of Section 8(e) adopted by the courts of appeals (except the Seventh Circuit in this case), and have espoused the analytical approach contended for here. On this point Professor Cox, a leading adviser on the drafting of these amendments, stated (*The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 273 (1959)):

> In a literal sense this clause [a work preservation provision] is an agreement between an employer and a union by which the employer undertakes not to do business with any other person, but it has a different function from the contracts which were the targets of section 8(e). A restriction upon subcontracting which seeks to protect the wages and

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to Section 8(b)(4)(B) to quiet the fear that the elimination of the term "concerted" from the old Section 8(b)(4)(A) would sweep primary activity within Section 8(b)(4)(B). See 105 Cong. Rec. 16589, II Leg. Hist. 1707. No similar problem existed in enacting Section 8(e).

> job opportunities of the employees covered by the contract, by forbidding the employer from having certain kinds of business done outside his own shop, is quite different in purpose and effect from blacklisting specified employers or groups of employers because their products or labor policies are objectionable to the union. The fact that Congress rejected the attacks upon the secondary boycott provisions of the Landrum-Griffin bill which alleged that the bill unwisely threw doubt upon the validity of bona fide restrictions upon subcontracting, may be attributed to disbelief in the allegation just as easily as to congressional opposition to contractual restrictions upon managerial freedom to subcontract, although there were undoubtedly individuals who hoped also to resolve the subcontracting issue in favor of management. Whatever the merits of the latter issue, it is distinct from the only explicit subject of legislative concern.

Similarly, Professor Lesnick, in a comprehensive discussion of the question involved here, stated (*Job Security and Secondary Boycotts: the Reach of NLRA §§8(b)(4) and 8(e)*, 113 U. Pa. Rev. 1000, 1013 (1965)):

> It seems entirely clear that the Eighty-sixth Congress did not expand the reach of the act in respect to the objects proscribed in the cessation-of-business formulation. The only grounds relied on for the contrary views are the assertedly sweeping language of section 8(e); the failure to amend the proposed legislation in response to fears expressed in Congress that primary boycotts would be pro-

scribed; and (reinforcing the previous point) a negative implication drawn from the provisos adopted for the construction and garment industries. Singly or cumulatively these are slender reeds. The section's language is sweeping only in its application to all industry, as distinguished from the Senate bill's limitation to certificated motor carriers, and in its care to embrace "any contract or agreement, express or implied." But these elements are irrelevant to the basic question, the objects forbidden, and in that respect section 8(e) is neither broader nor narrower than the 1947 provisions. It simply repeats the language of section 8(b)(4), and there is no reason to conclude that it does not have the same reach as the earlier statute. Nor can a negative implication justly be found in the provisos; to so find would be to ignore the plain truth that they were designed to permit contractural arrangements which were secondary in character, and therefore undeniably within the proscription of the body of section 8(e).

B. INCLUSION OF THE CONSTRUCTION INDUSTRY PROVISO IS CONSISTENT WITH A NARROW READING OF SECTION 8(e); THE PROVISO IS IRRELEVANT IN THIS CASE

Inclusion of the construction industry proviso in Section 8(e) is completely consistent with a narrow reading of that section. Furthermore, whether the pre-cut door provision involved here satisfies the terms of the proviso is irrelevant.[27]

[27] Since the Board found that the contract provision was primary and thus, not within Section 8(e), it had no occasion to determine whether, if the provision had been secondary, it

That proviso (*infra*, p. 41) exempts agreements "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction."[28] The legislative history of this proviso shows that it was designed to permit employers and unions in the construction industry to continue to enter into agreements providing that all jobsite work would be performed by union employees. Such an agreement is clearly secondary since the various contractors on a construction project are independent entities, and the agreement is aimed at non-union contractors who are disfavored because of their non-union working conditions.

Although the 1947 Act did not prohibit the making of such an agreement (or other forms of "hot cargo" agreements), this Court had held in *National Labor Relations Board* v. *Denver Bldg. Trades Council*, 341 U.S. 675, that a strike to enforce it violated Section 8(b)(4)(A) (now Section 8(b)(4)(B)).[29] The purpose of the proviso was to leave the law unchanged for the construction industry, for otherwise, by virtue of the enactment of Section 8(e), even the voluntary making of secondary agreements in that industry

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would have satisfied the proviso. See, however, *United Ass'n Pipefitters Local Union No. 539*, 154 NLRB No. 11 (August 5, 1965).

[28] There is also a proviso for the apparel and clothing industry (*infra*, p. 41). Congress exempted that industry not only from Section 8(e), but also from Section 8(b)(4)(B). See H. Rep. No. 1147, 86th Cong., 1st Sess. 40, I Leg. Hist. 944; 105 Cong. Rec. 19771–19772, II Leg. Hist. 1857–1858.

[29] See also *Local 1976, Carpenters' Union (Sand Door) supra*, discussed *supra*, p. 14.

would have become unlawful. That is, Congress intended to leave the parties in the construction industry free to continue to enter into agreements to make the job all-union, but did not relax the ban against using economic pressure to enforce those agreements. See H. Rep. No. 1147, 86th Cong., 1st Sess. 39–40, I Leg. Hist. 943–944; 105 Cong. Rec. 17900, II Leg. Hist. 1433; 105 Cong. Rec. A8359, II Leg. Hist. 1829–1830; 105 Cong. Rec. 19772, II Leg. Hist. 1858. See also *Essex County District Council of Carpenters* v. *National Labor Relations Board*, 332 F. 2d 636 (C.A. 3); *Construction, Production & Maintenance Laborers Union, Local 383* v. *National Labor Relations Board*, 323 F. 2d 422 (C.A. 9).

To be sure, Senator Kennedy, in explaining the effect of the proviso, pointed out that the "proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite." 105 Cong. Rec. 17900, II Leg. Hist. 1433.[20] However, since this statement occurred in the context of a discussion about "[a]greements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor" (*ibid.*), which are a form of secondary or "hot cargo" agreement (*supra*, p. 33), it is fair to conclude that Senator Kennedy was referring only to secondary agreements and not to primary agreements, like the

[20] See also H. Rep. No. 1147, 86th Cong., 1st Sess., 39, II Leg. Hist. 943.

one involved here."[21] That is, Senator Kennedy was merely indicating that, in recognition of the close community of interest among the various crafts on a building and construction project, Congress was willing to permit the construction unions and the contractors to continue to enter into agreements providing that only union contractors shall be employed on the job site, even though such agreements were secondary; but Congress was not willing to go so far as to permit these agreements to be used as a means of unionizing employers who were not in the building and construction industry as such but furnished products and supplies to the job site. See *National Labor Relations Board* v. *Teamsters, Local 294*, 342 F. 2d 18, 21–22 (C.A. 2); *Drivers, Local Union No. 695* v. *National Labor Relations Board*, 62 LRRM 2135, 2137–2138 (C.A. D.C.). Nothing in Senator Kennedy's remarks indicates that he was suggesting that, where, as here, the union's purpose in keeping manufactured goods off the job site is not to affect the conditions under which they were produced, but to protect the work opportunities of the employees on the job site, an agreement would be barred by Section 8(e).[22]

Thus, the construction industry proviso has the limited effect of excepting from Section 8(e)'s cover-

[21] This conclusion is buttressed by the circumstances that Senator Kennedy was explaining the limits of the proviso and not the reach of Section 8(e) itself; primary, work-preservation agreements are not within Section 8(e) at all.

[22] Similarly, the remarks of Senator McNamara, Representative Thompson and Representative Kearns about the construction industry proviso, referred to in n. 20, *supra*, also occur within the context of a discussion of secondary agreements.

age certain agreements which are admittedly secondary in nature—those directed against jobsite work by non-union employees. So regarded, the proviso is wholly compatible with the primary/secondary agreement analysis here developed,[23] and the reliance of the court below (R. 165–166) on the limited scope of the proviso, as a justification for its result, was misplaced.[24] Since work-preservation agreements are primary in nature, the question of the proviso's applicability to such agreements never arises. They are *ab initio* outside the intended reach of Section 8(e).

II. THE AGREEMENT HERE IS A "PRIMARY" ONE

The prohibition on the use of pre-cut doors in the Council-Association agreement is not a secondary agreement. The clause preserves for jobsite carpenters cutting-out and fitting work which they have

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[23] Acceptance of the primary/secondary agreement analysis in construing Section 8(e) does not make the construction industry proviso unnecessary or render it nugatory. That proviso, when Section 8(e) is narrowly read as extending only to secondary agreements, still operates to exempt from the coverage of that section certain agreements which would otherwise be prohibited—those relating to the subcontracting of jobsite work which are secondary in nature.

[24] See *Orange Belt District Council of Painters* v. *National Labor Relations Board*, 328 F. 2d 534, 537–538 (C.A. D.C.), stating: "Secondary subcontracting clauses in the construction industry are lawful, under the *proviso* to Section 8(e), and economic force may be used to obtain them notwithstanding Section 8(b)(4)(A), because Section 8(b)(4)(A) incorporates that *proviso* by reference. But under Section 8(b)(4)(B) such secondary clauses may be enforced only through lawsuits, and not through economic action. Primary subcontracting clauses, on the other hand, fall outside the ambit of Section 8(e). * * *."

performed for 80 years (R. 108). Nor is there evidence of any secondary intent on the part of the Union in enforcing that clause. The record does not show that the Union used the pre-cut door provision to dictate a signatory contractor's choice of suppliers or to compel him to deal only with unionized companies.

On the contrary, it shows that the Union refused to install doors bearing a union label (R. 11, 12, 14, 69, 79–80), that it did install doors without such a label (R. 16, 96–97), and that it even refused to install doors manufactured off the job site by carpenters it represented (R. 113). And, in the Frouge incident (*supra*, p. 4), after initially refusing to install pre-machined doors, the Union handled substituted doors made by the same manufacturer (Mohawk) which were *not* pre-machined. In short, the Union's conduct confirms that the clause was not concerned with the labor conditions under which the doors were manufactured, but solely with preserving, for the employees covered by the contract, work which they have traditionally performed.[25] Under these circumstances, the Board properly found that the clause here was a primary, work preservation agreement, and thus was outside the reach of Section 8(e).

The court of appeals' decisions referred to previously (*infra*, pp. 25–27) are not distinguishable on the ground (see Memorandum for Respondents in response to Pet. for Cert., p. 4) that those cases involved

[25] Indeed, by its terms, the clause flatly prohibits the signatory employer from giving the reserved work away, no matter who the supplier is or what conditions he meets.

"the subcontracting or assignment of work as such," whereas the present case involves "the banning of prefabricated products manufactured by other employers at distant locations remote from the Philadelphia jobs." The union's object determines whether an agreement is primary or secondary; it is primary if the object is to safeguard the bargaining unit covered by the contract, while it is secondary if the object is to exert pressure elsewhere. It is irrelevant to this determination whether the work sought to be protected was already being performed on the job site, or was incorporated in a product and thus never got to that site. If the work is lost, the impact on the job opportunities of the employees in the unit is the same in both cases. Moreover, in both cases, the union's object is only to protect those job opportunities, and not to affect a dispute or conditions elsewhere. Accordingly, an agreement not to purchase products incorporating unit work may be primary, no less than an agreement not to subcontract such work."

"It may be suggested that a provision that prevents a building contractor from reducing his labor costs by using pre-assembled materials is uneconomic and wasteful. (However, as pointed out, n. 8, *supra*, the prefabricated materials here were chosen by the project owners for structural and aesthetic reasons, and there is no evidence to what extent (if any) price was a factor.) But, such provisions, where motivated by a desire merely to preserve work for the bargaining unit, have none of the unfair and oppressive characteristics of "hot cargo" clauses and secondary boycotts, since they do not involve the conscription of a neutral employer in a campaign to coerce another employer with whom the union has a disagreement. Section 8(e) was not intended to resolve questions of public policy which may inhere in agreements radically different in purpose and nature from those the framers of the statute desired to

In sum, the agreement at issue here is a primary, work preservation agreement, and it therefore does not fall within the class of agreements made unlawful by Section 8(e) of the Act.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed insofar as it sets aside the Board's findings that the Union did not violate Sections 8(b)(4)(A) and 8(e) of the Act.

Respectfully submitted.

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reach. Indeed, Rep. Alger introduced a bill which would have flatly banned all union attempts to limit the use of prefabricated building materials (see 105 Cong. Rec. 12136, 12137, II Leg. Hist. 1566); it was not adopted.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this

clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

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